

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMERICAN PHYSICIANS
ASSURANCE CORPORATION,

Plaintiff-Counter-Defendant,

v.

DONALD JAMES HAM, M.D.,
ALAMOGORDO EYE CLINIC, INC.,

Defendants-Counter-Plaintiffs,

and THE ESTATE OF MARTHA
VALENCIA CARDON, DECEASED, by
and through Personal Representative
ELIZABETH ALVAREZ,

Defendant.

No. 1:08-cv-638 PK/ACT

ORDER

THIS MATTER comes on for consideration of Plaintiff APA's Motion in Limine to Exclude Marketing Material filed October 15, 2009 (Doc. 165). Upon consideration thereof, the motion will be denied without prejudice.

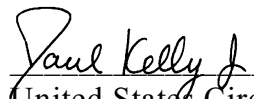
(1) Background. Plaintiff-Counter-Defendant APA seeks exclusion of its marketing materials created and disseminated after Defendants-Counter-Plaintiffs Dr. Ham and AEC purchased the policy in this case which was in effect from July 15, 2004 to July 14, 2005, on the grounds of relevance, confusion of the issues, and the danger of

unfair prejudice. Fed. R. Evid. 401, 402, 403. Dr. Ham and AEC respond that this material goes to a pattern or practice of institutional bad faith, as well as deficient claims processing under the Insurance Practices Act. Doc. 189 at 3-6.

(2) Disposition. The court did not permit amendment of the counterclaim to encompass new pattern or practice allegations under the theory of “institutional bad faith,” Doc. 197 at 3-4; however, the initial counterclaim alleges that APA had a policy of refusing to settle thereby exposing its physician insureds to excess liability, Doc. 34 at 5, ¶ 15, and also contains Insurance Practices Act claims concerning standards for investigating and processing malpractice claims, Doc. 34 at 7, ¶ 30. If shown to be relevant in the context of this case, such evidence might be admissible subject to Rule 403 balancing. The court will deny the motion at this time without prejudice.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff APA’s Motion in Limine to Exclude Marketing Material filed October 15, 2009 (Doc. 165), is denied without prejudice.

DATED this 30th day of November 2009, at Santa Fe, New Mexico.


United States Circuit Judge
Sitting by Designation